

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

OSCAR BRAMBILA and ERNESTINA)	CASE NO. C05-0484-RSL-MAT
BRAMBILA-GUZMAN,)	
Petitioners,)	
v.)	ORDER GRANTING TEMPORARY
ALBERTO GONZALES, et al.,)	STAY OF REMOVAL
Respondents.)	

On March 25, 2005, petitioners filed, through counsel, a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241, along with a Motion for Stay of Removal. (Dkt. #1). Petitioners ask this Court to stay their Seattle removal order so that they can file a motion to reopen deportation proceedings in Portland to collaterally attack a 1992 removal order entered *in absentia*. Petitioners allege that they never received notice of the Order to Show Cause (“OSC”), their deportation hearing, or the charges against them, and therefore, their *in absentia* order is unconstitutional and must be reopened. Respondents oppose the motion, arguing that the Immigration Court and the Board of Immigration Appeals (“BIA”) lack jurisdiction to reopen the Portland proceeding because the 1992 deportation order was “executed” by petitioners’ subsequent voluntary departure from the United States. (Dkt. #8).

Accordingly, the Court does hereby find and ORDER:

(1) Petitioners’ request for a temporary stay of removal pending a decision on the

01 merits of this case (Dkt. #1) is GRANTED. The standard of review for a stay of removal is set
02 forth in *Abassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998); *see also Andreiu v. Ashcroft*, 253 F.3d
03 477, 483 (9th Cir. 2001)(en banc)(concluding that 8 U.S.C. § 1252(f)(2) does not limit the power
04 of federal courts to grant a stay of removal). Under *Abassi*, petitioner must show either: (1) the
05 probability of success on the merits plus the possibility of irreparable harm, or (2) that serious legal
06 questions are raised and the balance of hardship tips in petitioner's favor. *Abassi*, 143 F.3d at 514.
07 The Court finds that petitioners meet the second prong.

08 As a general rule, a petitioner cannot reopen proceedings to challenge a removal order
09 when that petitioner has voluntarily left the United States after the removal order was entered.
10 *See Ramirez-Juarez v. INS*, 633 F.2d 174, 175-76 (9th Cir. 1980). However, a petitioner may
11 collaterally attack a final order of deportation if he or she can show that the prior order resulted
12 in a "gross miscarriage of justice." *See Matter of Farinas*, 12 I & N Dec. 467 (BIA 1967); *Matter*
13 *of Malone*, 11 I & N Dec. 730 (BIA 1966).

14 Petitioners allege that such a gross miscarriage of justice occurred respecting the 1992
15 order, sufficient to justify a collateral attack. The Court agrees that petitioners have raised
16 substantial due process questions and irregularities in the prior proceedings, alleging that they
17 were denied a full and fair hearing, as well as notice of the charges against them, resulting in an
18 *in absentia* deportation order. The December 23, 2004, Order of the Immigration Judge
19 presented as evidence in support of petitioners' motion further supports petitioners' position that
20 they did not receive notice of the OSC. (Dkt #2). Petitioners also assert that because they never
21 received notice of their hearing, the *in absentia* order cannot serve as the predicate to deny relief
22 in the subsequent removal proceedings in Seattle. Based on all of the above, the Court now finds
23 that the balance of hardships tip in petitioners' favor.

24 (2) The Court expresses no views at this time as to the merits of petitioners' habeas
25 petition.

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01 (3) The Clerk shall direct a copy of this Order to all counsel of record, and shall
02 forward a copy of this Order to Judge Theiler.

03 DATED this 26th day of April, 2005.

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06 Robert S. Lasnik
07 United States District Judge
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09 Recommended for Entry
10 this 22nd of April, 2005.

11 s/ Mary Alice Theiler
12 United States Magistrate Judge
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